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# Criminal Law--Imperfect Self-Defense

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## CRIMINAL LAW—IMPERFECT SELF-DEFENSE

one is not punishable criminally for taking the life of another person when he has been put under the necessity or apparent necessity of doing so, there being no fault on his own part, in order to protect himself from the peril of death or serious bodily harm at the hands of the person whose life he took."<sup>1</sup> This is a universally recognized statement and for the purposes of this note will be denoted as "perfect" self-defense.

The problem with which this note is primarily concerned, however, is not that of perfect self-defense; it is rather with that which is termed "imperfect" self-defense. A hypothetical situation presenting the question arises when the accused has killed another man in the defense of his own life, yet through some fault of his own, has contributed to the necessity for the killing. The solution to the problem seems quickly to divide itself into two parts. The first is the self-evident solution that if the slayer had been motivated by a felonious purpose to provoke the argument or difficulty, so that he might kill the deceased and then use the affray as an excuse, upon which to base a plea of self-defense, then this would furnish the malice, premeditation, and deliberation requisite for first degree murder. If, however, the slayer did not provoke the difficulty with a felonious purpose, the original wrong having been one which involved a lesser crime, the solution becomes more difficult. It is clear that he would not be guilty of murder because he employed no malice in his original wrong. Conversely, he would not be eligible for the perfect self-defense plea, for he was not wholly without fault in bringing on the necessity for the homicide. What then, will be this man's legal status? The courts have answered this question by distinguishing between "perfect" self-defense and "imperfect" self-defense. It is the latter category which covers the case of the slayer in the hypothetical situation above.

This distinction is evident in the law at least as early as the middle of the 17th century. The case of *Drayton Basset*, reported by Crompton and cited by Hale<sup>4</sup> illustrates the principle. A went to B's house and by force of arms put him out and entered into unlawful possession. Three days later B returned to the house with several persons with the intent to oust A and regain the rightful possession of his home. In the ensuing conflict one of B's friends attempted to set fire to the thatched roof of the house so as to force A to come out. A shot and killed this person. At the trial A pleaded that the killing was necessary to prevent his being killed or severely burned, and

<sup>1</sup> 26 AM. JUR., Self Defense, sec. 125.

<sup>2</sup> *Wallace v United States*, 162 U.S. 466, 40 L.Ed. 1039, 16 Sup. Ct. 859 (1895).

<sup>3</sup> *Reed v State*, 11 Tex. Cr. App. 509, 40 Am. Rep. 795 (1882)

<sup>4</sup> 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 440 (1788)

therefore was justified, since committed in self-defense. He was not acquitted, however, and was convicted of manslaughter. The reason given for this holding was that A had initiated the trouble by his unlawful entry and holding with force of B's house; consequently, he could not avail himself of a plea of perfect self-defense.

Hawkins, in commenting on the plea of self-defense,<sup>5</sup> distinguishes between perfect and imperfect self-defense. He points out that if one seeks to take advantage of the plea of perfect self-defense, and thus render the homicide justifiable, he must show himself to be wholly without fault in bringing on the necessity for the killing. On the other hand, he says, "if a man, in defense of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least."<sup>6</sup>

In East's treatise,<sup>7</sup> there is a discussion which suggests a possible origin of the separation of self-defense into the two categories, "perfect" and "imperfect" Here East says:

"I come next to consider the principle of those cases where the killing in self-defense is only excusable, which Mr. Justice Foster calls '*self-defense culpable*', but through the benignity of the law *excusable*' which distinction he grounds upon this, that the necessity is in some measure founded upon the fault of the party urging it in his excuse, which is not in the case of *justifiable* self-defense."<sup>8</sup>

East goes on to say that by statute,<sup>9</sup> the two situations are distinguished by denoting the "self-defense culpable" a "homicide upon chance-medley in self-defense" The difference was that the statute provided separate penalties; for justifiable self-defense the forfeiture of the defendant's estate was waived, but for homicide upon chance-medley in self-defense, the forfeiture still remained. This differentiation, or partition, of self-defense has become more distinct in the later cases, particularly in the United States.<sup>10</sup>

Probably the most celebrated of the United States cases which concern themselves with the doctrine of imperfect self-defense is the Texas case of *Reed v. State*,<sup>11</sup> decided in 1882. The defendant and the deceased's wife were discovered in an act of adultery by the deceased. In the ensuing conflict it became necessary, in order to preserve his own life, for the accused to kill the husband. The lower

<sup>1</sup> HAWKINS, PLEAS OF THE CROWN 82, 83 (8th ed. 1716).

<sup>2</sup> *Id.* at 82.

<sup>3</sup> EAST, TREATISE OF THE PLEAS OF THE CROWN 279 (1803)

<sup>4</sup> *Id.* at 279.

<sup>5</sup> 24 HEN. VIII, c. 5 (1532)

<sup>10</sup> *Freeman v. State*, 74 Ark. 1035, 298 S.W. 323 (1937) *Taber v. Commonwealth*, 26 Ky. L. Rep. 754, 82 S.W. 443 (1904) *State v. Thomas*, 184 N.C. 757, 114 S.E. 834 (1922) *State v. Crisp*, 170 N.C. 790, 87 S.E. 511 (1916), *King v. State*, 13 Tex. Cr. App. 277 (1882) *Reed v. State*, 11 Tex. Cr. App. 509, 40 Am. Rep. 795 (1882) *State v. Flory*, 40 Wyo. 184, 276 Pac. 458 (1929).

<sup>11</sup> 11 Tex. Cr. App. 509, 40 Am. Rep. 795 (1882)

court held that the defendant was not entitled to employ his right of self-defense, nor was he justified in resisting the husband's attack. In reversing the conviction of murder, because of this erroneous holding, the Court of Appeals of Texas pointed out the existence of the right of imperfect self-defense, and the fact that the defendant was entitled to it. In regard to the slayer's actions the court said:

"If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong."<sup>12</sup>

Since the wrong complained of was adultery, which was only a misdemeanor in Texas, the defendant would be guilty of manslaughter. The conviction of murder was reversed and the case remanded for a new trial.

In another Texas case, in one view of the evidence, it appeared that the defendant went to the deceased's house for the purpose of having carnal intercourse with the latter's wife, the suspicion of which purpose caused deceased to assault him. It was held that under these facts the issue of imperfect self-defense was raised and that it was the duty of the court to charge on manslaughter.<sup>13</sup>

In *Taber v. Commonwealth*,<sup>14</sup> a Kentucky case, the defendant and two brothers became involved in an argument. The following day was Sunday and the defendant approached one of the brothers as he stood in front of a church and made certain statements and remarks which were designed to further the previous day's altercation. As the defendant was armed and had a notorious reputation as a dangerous man, the second brother thought the first was in danger of being killed or of suffering great bodily harm. Thereupon, he struck the accused from behind with a rock. On being hit the defendant wheeled and shot, killing the boy. At the trial the defendant's plea was self-defense, but he was convicted of voluntary manslaughter because by his own actions he had induced the necessity for the homicide, and thus could not avail himself of the plea of perfect self-defense.

Other cases may be found in which the defendant has been at fault in provoking a fight, having at the time no intent to take his adversary's life or even to do him any great harm, only to suddenly find, due to the fierceness of his opponent's attack, that he must slay him in order to preserve his own life.<sup>15</sup>

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<sup>12</sup> *Id.* at 517.

<sup>13</sup> *Nicks v. State*, 46 Tex. Cr. R. 241, 79 S.W. 35 (1904).

<sup>14</sup> 26 Ky. L. Rep. 754, 82 S.W. 443 (1904).

<sup>15</sup> See note 10 *supra*.

Two other situations are distinctly related to, and may be included within the purview of imperfect self-defense. The first is where A becomes involved in a fight through no particular fault of his own, and thereby is entitled to self-defense. In the exercise of this right he uses a greater force than is reasonably necessary to protect himself and in doing so, slays his opponent.<sup>16</sup> The other class, or category, of cases which may be placed within the bounds encompassed by the right of imperfect self-defense is the situation wherein the slayer honestly, but unreasonably, believes his life to be endangered by the deceased.<sup>17</sup> In such a case the "imperfection" in the plea of self-defense is the unreasonable belief, but because of the circumstances of good faith so closely associated with this belief, the law will not charge the defendant with murder, but will mitigate the homicide to manslaughter.<sup>18</sup>

The following summary of the present day law of self-defense is submitted. The plea of perfect self-defense provides an absolute defense for the defendant who kills another in the defense of his own life. The actor must be entirely without fault and his conduct must be reasonable in order to avail himself of this privilege. If, however, he acts with malice and only feigns self-defense for the purpose of carrying his evil intention to a successful end, the law, if his design is discovered, will demand his conviction of murder. Between the extremes of absolute excuse giving rise to an acquittal on one hand, and the conviction of murder on the other, there lies the plea of imperfect self-defense. In such a situation the defendant is not wholly free from fault in causing the necessity for the homicide but neither did he kill with "malice" He is not entitled to an absolute defense, because of the element of fault, yet he did not slay the deceased with "malice" so is therefore not a murderer. In such case the homicide will be reduced from murder to manslaughter. This right of imperfect self-defense seems to have arisen from the need for an adequate and proportionate remedy for the offense committed or from a desire to penalize one who is not without fault, yet deserves to some extent the benignity of the law. In other words, "the law justly limits his right of self-defense, and regulates it according to his own wrong."<sup>19</sup>

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<sup>16</sup> *Martinez v. State*, 142 Tex. Cr. R. 143, 151 S.W. 2d 817 (1941).

<sup>17</sup> 2 BURDICK, LAW OF CRIME sec. 461 (1946).

<sup>18</sup> *Allison v. State*, 74 Ark. 444, 86 S.W. 409 (1904).

<sup>19</sup> *People v. Filippelli*, 173 N.Y. 509, — 66 N.E. 402, 404 (1903)